

STATE OF MICHIGAN
COURT OF APPEALS

SCOTT A. JESKO,

Plaintiff-Appellant,

V

CONSUMERS ENERGY COMPANY, and
PECKHAM, GUYTON, ALBERS & VIETS,
INC.,

Defendants-Appellees,

and

GRAND RAPIDS BUILDING AUTHORITY, and
KENT COMPANIES, INC.,

Defendants,

and

PECKHAM, GUYTON, ALBERS & VIETS, INC.,

Cross-Plaintiff,

v

KENT COMPANIES, INC.,

Cross-Defendant.

UNPUBLISHED

July 21, 2005

No. 252975

Kent Circuit Court

LC No. 01-00246-NO

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that granted summary disposition in favor of defendants Peckham, Guyton, Albers & Viets, Inc. (PGAV), and Consumers Energy Company ("Consumers"),¹ and we affirm.

I. Nature Of The Case

Plaintiff worked for a subcontractor of Kent Companies, Inc. ("the contractor"), which was the general contractor for a city construction project. Prior to construction, Consumers had relocated an overhead electrical wire so that it would run approximately ten feet from what was to be the western wall of the building, and the wire ran thirty-five feet above the ground. Approximately one week before the incident in issue, the contractor erected a scaffold on the western wall of the building. This scaffold extended to within approximately eight feet from the overhead wires. On the date of the incident, plaintiff was using a "bull float"² to spread and smooth concrete that had been poured to create a concrete deck. Though plaintiff had no reason to do so, and though no other workers were working on that side of the building, plaintiff decided to bull float on the western side of the building.

Despite testifying that he was aware of the overhead lines, and that he felt that the accident was his fault, plaintiff nevertheless filed the instant negligence suit against defendants, seeking compensation for his injuries. In response, defendants say that plaintiff and his employer bore the primary responsibility for ensuring plaintiff's safety in the workplace, and that neither had any duty to warn plaintiff because it was not reasonably foreseeable that plaintiff, or anyone else, would be working in close proximity to power lines and in violation of state workplace safety regulations.

II. Factual Background

Plaintiff's accident occurred on January 7, 2000, at the construction site of the Grand Rapids Community Archives and Research Center. PGAV performed the architectural design for the building and, under contract, PGAV was responsible for design, construction administration, and inspection to assure that construction matched the architectural plans. Under the contract, general workplace safety was not the responsibility of PGAV, but was expressly the responsibility of the general contractor, Kent Companies, Inc.

Before construction of the building, the utility company, Consumers Energy, relocated a utility pole that was close to the construction site. After it was moved, the pole stood

¹ The trial court entered orders dismissing defendants Grand Rapids Building Authority and Kent Companies, Inc. Plaintiff does not appeal the dismissal of these defendants.

² A "bull float" consists of a large, flat, rectangular piece of wood or metal attached to a handle that ranges from six to twenty-four feet long. It is used to smooth and distribute concrete. The term "bull float" is also used within the industry as a verb to describe the act of using a bull float to spread and smooth concrete. The bull float plaintiff used had an aluminum handle attached, and later, we will discuss the question of why plaintiff failed to follow normal safety precautions which required the use of an insulated handle.

approximately thirty-five feet above ground and ten feet, 1-¾ inches away from what would become the west wall of the building. About a week before the accident, the general contractor erected a scaffold, the closest edge of which was approximately eight feet, one inch from the wire.

On the day of the accident, plaintiff was smoothing concrete for the roof of the three-story building. He used a bull float, which consists of a large flat rectangular piece of wood attached to a handle made of sections that vary the total length of the instrument. The handle plaintiff used was metal and could be extended to eighteen feet long. To properly smooth concrete, a bull floater must be mindful of his surroundings because contacting the handle with any other object can upset the finish of the concrete.

Plaintiff testified, somewhat inconsistently, about all aspects of the incident. For example, plaintiff testified that he did not remember observing the wires, but that he did think that he needed to avoid them. Again, plaintiff said that he thought the lowest wire was a telephone wire, but that it might have been electric. Plaintiff stated that he was not warned about avoiding contact with the wires, yet he admitted that a coworker pointed out the wires before he commenced work on the roof. Plaintiff did not remember how close the handle of his bull float came to the wire. The accident occurred during a backstroke when he had six inches of smoothing to finish and had his back to the wires, which meant the handle was positioned at a sharp angle. Plaintiff says that he did not remember if he was ordered to work on the west side of the building and that nobody cautioned him not to do so.

Plaintiff's foreman stated that he told plaintiff that he did not need to work on the west side of the wall, but he did not tell him not to go there. The foreman also stated that bull floating from the west side was unnecessary because the concrete finish of the roof did not have to be as precise as for a normal floor. After the accident, Consumers interviewed plaintiff and he admitted fault:

A.[Plaintiff] [In response to the question of whether anyone told plaintiff about the power lines] Yeah. Yeah, they did. More than one time they did.

Q.[Investigator for Consumers] And in what way?

A. Just that the lines were there. I mean, I don't remember the conversation, but I remember talking about the power lines. I can't remember what it was but, the guy that brought me to the hospital, he's the one that was talking about power lines. I can't remember what the reference was or not, but, actually, I had – *it was just before the pour, he even referenced the power lines so, as far as I'm concerned it was my own fault.*

* * *

Q. OK. Well, it's one of the important things I look for is if there is any prior knowledge of [overhead wires] being there and most of the things I come to they [sic] are accidents, you know, I mean people know they're there and then they get caught up in their work and they just don't pay attention. It's just like hooking up an antenna, you know, putting [sic] another tower or something

like that. They know they're there and they just don't think about it or they think they're going to go underneath the lines instead of going up against the lines or there [sic] hundreds of reasons why these things happen, so -

A. Yeah, *I would say it's my fault. It's nobody else's fault but my own.*
[Emphasis added.]

Defendants say that, as the architect and utility company, they should not have a duty to attend to this particular safety issue because this falls within the responsibility and duty of plaintiff, his employer, and the contractor and co-employer.³ To this point, defendants note that plaintiff's employer was cited for safety violations by the Michigan Occupational Safety and Health Administration because plaintiff was permitted to work within ten feet ten inches of power lines, and because defendant's bull float was made of conductive metal rather than a material that does not conduct electricity. Defendants say that, had plaintiff taken proper care, heeded the warnings, and used proper materials and had the employer or contractor enforced these common sense safety rules, the incident would have never occurred.

III. Analysis

Plaintiff argues that the trial court erred when it dismissed plaintiff's claims for lack of duty.⁴ Plaintiff argued that PGAV and Consumers owed him a duty to protect him from receiving an electrical shock while he was bull floating.

The existence of a legal duty is a question of law. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001); *Groncki v Detroit Edison Co*, 453 Mich 644, 649; 557 NW2d 289 (1996). In determining whether a legal duty exists, courts examine a variety of factors, including "foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and . . . the burdens and consequences of imposing a duty and the resulting liability for breach." *Buczowski v McKay*, 441 Mich 96, 101 n 4; 490 NW2d 330 (1992). See also *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993).

³ Plaintiff worked for a subcontractor of a subcontractor of Kent Companies, Inc. The trial court dismissed Kent Companies, Inc., on the basis that it is a co-employer entitled to the exclusive remedy provision of the Workers Compensation Disability Act. Plaintiff did not appeal this ruling.

⁴ This Court reviews de novo circuit court decisions granting summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A motion for summary disposition under MCR 2.1116(C)(10) challenges the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The court must consider all pleadings, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.*

A. PGAV

Plaintiff argues that PGAV, as the project's architect, owed him a duty under *Estate of Clark (Swarthout v Beard)*, 33 Mich App 395; 190 NW2d 373 (1971), rev'd in part on other grounds sub nom *Smith v City of Detroit*, 388 Mich 637 (1972). Plaintiff's substantial reliance on *Clark* is misplaced. In *Clark*, the plaintiff's decedent was killed when excavation caved in on him. *Clark, supra* at 398. The general contractor was required under the contract to ensure the safety of the workers and the public. *Id.* at 400. But the architect in *Clark*, unlike here, had a duty under the contract to inspect construction and, as the owner's representative, exclusive authority to stop work. *Id.* at 400-401. Twenty percent of the architect's fee was for supervision of the contract. *Id.* at 400. The authority to stop work was for the purpose of enforcing any provisions of the contract between the owner and contractor, which included maintaining the excavation in a safe condition. *Id.* The architect was personally aware that one wall of the excavation was neither shored nor sloped and agreed the condition was dangerous and that he would have it corrected. *Id.* at 400-401. Under these facts, this Court held that the architect had a duty to plaintiff's decedent. *Id.* at 402. This Court stressed that the architect knew "employees were working in the area of the wall and were in the zone of peril; injury could be foreseeable." *Id.*

Here, like the architect in *Clark*, PGAV was paid a fee for fulfilling a similar supervisory role, but the parallels end there. PGAV did not have authority to halt construction. It did not have actual knowledge that workers would be within a zone of danger. Unlike an excavation pit where workers are confined to a limited area and vulnerable to a cave-in, the workers in this case were not required to come dangerously close to the electrical wires. Moreover, the wire was relocated after PGAV designed the building and construction commenced. Relocation fell under the purview of Consumers and the contractor. Even viewed in the light most favorable to plaintiff, evidence of PGAV's "approval" of the relocation merely reflected an approval of payment, not of the specific location. Because PGAV had virtually no knowledge or control of the circumstances of the accident, the holding of *Clark* does not apply to this case. PGAV did not owe a duty to plaintiff. *See also Signs v Detroit Edison Co*, 93 Mich App 626, 635; 287 NW2d 292 (1980) (distinguishing *Clark* on degree of control grounds) abrogated on other grounds by *Ormsby v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004).

Moreover, and importantly, the general conditions incorporated into the contract governing this construction project clearly provide that the contractor, defendant Kent Companies, Inc., (and not PGAV), "*shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work.*" (Emphasis added.) Significantly, the contract further provides that Kent Companies, Inc., and not PGAV, "*shall notify owners of adjacent property and of underground facilities and utility owners when prosecution of the Work may affect them, and shall cooperate in the protection, removal, relocation and replacement of their property*" (emphasis added).

Furthermore, plaintiff's contention that PGAV is liable because it violated the ten-foot setback rule of the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.1001 *et seq.*, is unpersuasive. Plaintiff cites no authority stating that MIOSHA applies to architects. Read together, MCL 408.1002(1) and (2) contemplate application of MIOSHA to "all places of employment" and the rights, duties, and liabilities of "employers and employees." A fair reading

of the statute limits the scope of MIOSHA in this case to the relationship between plaintiff and his employer, the general contractor, and does not create a duty on behalf of PGAV.

Accordingly, we hold that the trial court properly dismissed plaintiff's claims against PGAV.

B. Consumers

Plaintiff also maintains that Consumers Energy owed him a duty to protect him from the overhead power lines.⁵

Our analysis must be guided by a trilogy of cases decided by our Supreme Court that involved electrocution of workers by uninsulated overhead wires. *Groncki v Detroit Edison*, 453 Mich 644, 649; 557 NW2d 289 (1996). All three cases were decided on summary disposition and addressed the issue of duty. *Id.* The first case involved a forklift operator who was injured while moving twenty-nine foot high scaffold. *Id.* at 650. The power lines he contacted were sixty-five feet from the building under construction and thirty-five feet above ground. *Id.* The employer had warned the employee of the presence of power lines. *Id.* In the second case, a maintenance supervisor at a condominium complex was injured while attempting to move a twenty-four-foot aluminum ladder by himself. *Id.* at 651. Earlier he warned another worker about the danger of working near the power lines, which were fourteen and a half feet from the building and twenty-one feet above ground. *Id.* The final case concerned a deliveryman who

⁵ In *Schultz, supra*, the plaintiff's decedent was electrocuted while helping a friend paint. *Schultz, supra* at 447. The decedent was holding a twenty-seven foot aluminum ladder when, without touching the overhead wire, he was electrocuted. *Id.* at 448. The wire was approximately twenty-four feet above the ground and fifteen feet, six inches from the house. *Id.* The wire was frayed. *Id.* at 448-449.

Our Supreme Court held "a power company has an obligation to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects." *Id.* at 451. The Court's reasoning relied on the inherently dangerous properties of electricity, the expertise that power companies possess, and the fact that reasonable persons lack the necessary expertise. *Id.* The Court also found that one could reasonably foresee the painter's injury. *Id.* at 452. According to the Court:

Those engaged in transmitting electricity are bound to anticipate ordinary use of the area surrounding the lines and to appropriately safeguard the attendant risks. The test to determine whether a duty was owed is not whether the company should have anticipated the particular act from which the injury resulted, but whether it should have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work, or pleasure. [*Id.*]

The Court also held that compliance with National Electric Safety Code setback requirements was not dispositive and, in any event, the guidelines only set minimum safety standards. *Id.* at 455-457.

ignored specific warnings in his truck and was electrocuted and killed when, to unload the truck, he raised its boom beneath power lines that were twelve feet from the house and twenty-six feet above the ground. *Id.* at 652-653.

In the first case, the Court held, in language equally applicable here, that the power company “could not have reasonably foreseen that a skilled workman, with full knowledge of the power lines, would bring a crane into contact with those power lines.” *Id.* at 657. The location of the wire, its condition, and the fact that the twenty-nine foot scaffold was uncollapsed as the decedent drove his forklift in reverse also made the accident fortuitous. *Id.* at 657-658. Finally, like here, the decedent was aware of the wires and the defendant power company owed him no duty to warn about a known danger. *Id.* at 658.

In the third case, the Court held that the defendant could not reasonably foresee that a skilled and experienced workman would disregard the warnings inside his truck and operate its boom below power lines. *Id.* at 659. Further, mere knowledge of construction in the area did not mean that the power company should expect a large delivery truck to raise its boom below power lines. *Id.* at 660. Instead, “it can reasonably expect that trained workmen will not operate delivery vehicles directly under power lines or, if such operation is required, will properly inform [the power company].” *Id.* The Court also noted the location of the wire, its condition, and the fact that the wire was relocated and put in place before construction commenced. *Id.*

The Michigan Supreme Court’s reasoning and rulings in all three cases in *Groncki* lead to the conclusion that Consumers had no duty to plaintiff here. Consumers could not have reasonably foreseen the kind of injury that plaintiff suffered. The overhead power lines were placed before construction began. The location of these power lines was approved by the Grand Rapids city engineer. Consumers was not provided blueprints of the construction project, nor was it invited to take part in any of the construction meetings. At no time did anyone ask Consumers to shut off power to the overhead lines in question, nor did anyone request that the lines be covered with protective sleeves. Consumers thus had no way of knowing that anyone would build a scaffold within ten feet of the power line in question, and similarly had no way of knowing that someone would use a bull float with a conductive handle in close proximity to the power lines. Indeed, as discussed above, plaintiff’s employer was cited for violations of MIOSHA safety regulations for allowing plaintiff to work within ten feet ten inches of power lines and for permitting the use of a bull float with a conductive handle, instead of one with a nonconductive handle, or with a nonconductive sheath. On the day of the accident, plaintiff and his fellow employees were made aware of the power lines, and plaintiff himself testified that he knew where the lines were. The power lines themselves were in plain view, and were in a good condition—neither frayed nor damaged or dilapidated in any way. While some testimony conflicted, evidence showed that plaintiff and his co-employees had been instructed to work on the side of the building *opposite* from the power lines, and plaintiff ignored this directive. Indeed, as noted above, when interviewed a short time after the accident, plaintiff admitted that the accident was his own fault.

Our review of the record, and our application of the rulings in *Schultz* and *Groncki* lead us to conclude that the trial court properly dismissed plaintiff’s claims against Consumers.

Affirmed.

/s/ Henry William Saad

/s/ Michael R. Smolenski

/s/ Jessica R. Cooper